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FRANKLIN M. WICKER, JR., Appellant)	
)	
and)	Docket No. 04-1595
)	Issued: July 25, 2005
U.S. POSTAL SERVICE, GENERAL MAIL)	
FACILITY, Fort Worth, TX, Employer)	
)	

Case Submitted on the Record

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

On July 9, 2003 appellant filed a timely appeal of the January 21, 2003 merit decision of the Office of Workers' Compensation Programs, which denied modification of an August 5, 2002 decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

The issue is whether the Office properly determined that the issue presented was a recurrence of disability beginning March 11, 2002.

Appellant, a 44-year-old mail processor, sustained a traumatic back injury while in the performance of duty on April 16, 1994. The Office initially accepted the claim for lumbar strain. On November 17, 1994 the Office expanded the claim to include herniated nucleus pulposus at L4-5 and S1. Appellant underwent a three level 360 degree spinal fusion on January 10, 1995 followed by a second surgical procedure to remove hardware on September 7, 1995. He

received appropriate wage-loss compensation and returned to limited duty on November 27, 1995.

In a decision dated August 19, 1996, the Office found that appellant's actual earnings as a part-time, limited-duty mail processor fairly and reasonably represented his wage-earning capacity. Effective February 8, 1996, he worked 30 hours per week at an hourly rate of \$15.68. Accordingly, the Office adjusted his compensation based on his weekly earnings of \$470.40. Appellant subsequently received a schedule award for 14 percent impairment of the right lower extremity and 28 percent impairment of the left lower extremity, for a total of 120.96 weeks of compensation. He continued to work limited duty, 30 hours per week and when his schedule award expired on September 16, 2000 the Office resumed payment of wage-loss compensation for partial disability.

Appellant stopped work on March 11, 2002. He provided the employing establishment with medical documentation from his treating physician, Dr. Kevin Gill, a Board-certified orthopedic surgeon, who excused appellant from work through April 29, 2002. Appellant also submitted May 10, 2002 treatment records from Dr. Craig B. Danshaw, D.O., a Board-certified anesthesiologist specializing in pain management.¹ On May 20, 2002 Dr. Gill excused him from work because his current medication caused excessive sedation, making it unsafe for appellant to work or drive. Dr. Danshaw later reduced appellant's medication and he noted on June 6, 2002 that, while appellant was functioning well and was able to drive, he was still not able to work.

On June 14, 2002 appellant filed a claim for compensation (Form CA-7) for lost wages for the period March 11 to May 17, 2002. That same day the employing establishment advised him to file a claim for recurrence of disability (Form CA-2a). Appellant filed a notice of recurrence on June 20, 2002.

By letter dated June 24, 2002, the Office acknowledged receipt of appellant's claim for compensation beginning March 11, 2002. The Office explained the legal requirements for both a recurrence of disability and modification of a formal loss of wage-earning capacity determination. Additionally, the Office advised appellant that he had 30 days to submit the necessary documentation.

In a report dated July 11, 2002, Dr. Gill indicated that, when he saw appellant on March 22, 2002, he had a severe increase of low back pain with stiffness, decreased range of motion and an inability to sleep secondary to severe pain. He decided at that time to take appellant off work and transfer his care to an appropriate pain management specialist to address his chronic intractable pain. When Dr. Gill next saw appellant on April 15, 2002 he continued to exhibit a limited range of motion and he remained off work. Dr. Gill saw him again on May 20, 2002. At that time appellant was under the care of a pain management physician, who, 10 days prior, had prescribed Kadian, 50 milligrams. Dr. Gill explained that the medication was very sedating and he immediately arranged an appointment with Dr. Danshaw to review appellant's medication. Dr. Gill provided him with an off work note due to the excessive sedation affect of the Kadian. He also indicated that, because he was no longer managing

¹ Dr. Danshaw administered a caudal epidural block and a paralumbar facet injection on May 10, 2002.

appellant's medication, all future work status forms would be provided at Dr. Danshaw's discretion.

By decision dated August 5, 2002, the Office denied appellant's claim for wage loss beginning March 11, 2002. The Office found that he failed to establish that the claimed recurrence was causally related to the April 16, 1994 employment injury. Additionally, the Office found that appellant had not demonstrated a basis for modification of the August 19, 1996 loss of wage-earning capacity determination.

Appellant requested reconsideration on August 30, 2002 and he submitted additional medical evidence which included an August 12, 2002 report from Dr. Gill and additional treatment records from Dr. Danshaw. In a report dated August 15, 2002, Dr. Danshaw noted that he had received 3 caudal block and facet injections and his pain was down to 3 on a scale of 10. He also indicated that he was going to return him to light-duty status starting at about four hours per day. Appellant resumed working four hours per day on August 26, 2002. In a November 6, 2002 report, Dr. Danshaw indicated that he was able to work six hours per day, which appellant began working on November 12, 2002.

In a decision dated January 21, 2003, the Office denied modification. The Office found that appellant failed to establish that he sustained a recurrence of his April 16, 1994 injury such that he could no longer perform his modified duties.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.²

The Office's procedure manual provides that, if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss.³ The procedure manual further indicates that under these circumstances, "the [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal [loss of wage-earning capacity] decision."⁴

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally

² See *Katherine T. Kreger*, 55 ECAB ____ (Docket No. 03-1765, issued August 13, 2004).

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995).

⁴ *Id.*

rehabilitated or the original determination was, in fact, erroneous.⁵ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁶

ANALYSIS

The Office issued a formal loss of wage-earning capacity decision on August 19, 1996 finding that appellant's actual earnings as a part-time, modified mail processor fairly and reasonably represented his wage-earning capacity. This determination remained in effect at the time of appellant's March 11, 2002 work stoppage. In a June 24, 2002 letter to appellant, the Office outlined the legal requirement for modification of a loss of wage-earning capacity determination. The Office also explained the requirements for establishing a recurrence of disability. In its August 5, 2002 decision, the Office identified the issue as whether appellant had established a recurrence of disability beginning March 11, 2002 causally related to his April 16, 1994 employment injury. Under the heading "Basis for Decision," the Office indicated that the evidence was insufficient to support that the claimed recurrence was causally related to the April 16, 1994 employment injury. The Office further noted that appellant failed to demonstrate that "a criteria (sic) for modification of a prior [loss of wage-earning capacity determination] has been met." This latter finding was not accompanied by a specific analysis of the evidence of record. The Office merely provided a one-sentence statement of the law concerning modification along with the previously quoted finding.

When the Office conducted its January 21, 2003 merit review, once again it identified the issue as whether appellant provided sufficient evidence to establish that he sustained a recurrence of disability effective March 11, 2002, causally related to his April 16, 1994 employment injury. Other than noting that appellant worked six hours of modified duty and was entitled to two hours of compensation per day, the Office did not specifically reference the August 19, 1996 loss of wage-earning capacity determination. Unlike the prior decision dated August 5, 2002, the Office did not identify the legal criteria for modification of a formal loss of wage-earning capacity determination. The Office denied the claim for additional wage-loss compensation because appellant failed to provide substantive medical evidence establishing that "he suffered a recurrence of his April 16, 1994 injury...."

Both the Office's procedure manual and Board precedent provide that, when a wage-earning capacity determination has been issued and appellant submits evidence with respect to disability for work, the Office must evaluate the evidence to determine if modification of the Office's wage-earning capacity decision is warranted.⁷ Accordingly, the Office, in its January 21, 2003 decision, should have considered whether appellant established a basis for modification of the August 19, 1996 wage-earning capacity determination.

⁵ *Tamra McCauley*, 51 ECAB 375, 377 (2000).

⁶ *Id.*

⁷ *Katherine T. Kreger*, *supra* note 2; *Sharon C. Clement*, 55 ECAB ____ (Docket No. 01-2135, issued May 18, 2004).

CONCLUSION

The Board finds that appellant's claim for compensation beginning March 11, 2002 raised the issue of whether modification of the Office's August 19, 1996 wage-earning capacity determination was warranted. As the Office did not properly adjudicate this issue, the case will be remanded for an appropriate decision.

ORDER

IT IS HEREBY ORDERED THAT the January 21, 2003 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: July 25, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board